United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7536

United States Court of Appeals
FOR THE SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellee,

—against—

OVERSEAS NATIONAL AIRWAYS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Did the District Court properly act within the discretion of a trial Court, and without making clearly erroneous findings of fact, in issuing a preliminary injunction order against defendant's Pilot Bulletin 35-75, which unilaterally placed into effect certain terms and conditions of employment for defendant's pilots which defendant unsuccessfully sought to obtain in negotiations with plaintiff under the Railway Labor Act and were the subject of mediation before the National Mediation Board at the time of defendant's unilateral action, and which caused an actual change in the working conditions for defendant's pilots without prior conclusion of a collective bargaining agreement embodying such change under Sections 5 and 6 of the Railway Labor Act?

COUNTER-STATEMENT OF THE CASE

Parties and District Court Proceedings.

The defendant Overseas National Airways, Inc. (herein ONA) appeals from a preliminary injunction (386A) entered in the United States District Court for the Eastern District of New York on August 2, 1975 upon the memorandum decision of District Judge Costantino dated July 28, 1975. (375A). ONA is a certified supplemental, or charter, air carrier. Plaintiff Air Line Pilots Association, International (herein ALPA) is the certified collective bargaining representative under the Railway Labor Act, 45 U.S.C. §151 et seq. (herein the Act) for ONA's pilots, including captains and first officers (co-pilots).

The Court's order preliminarily restrained ONA from implementing Pilot Bulletin 35-75 (herein referred to at times as the pilot bulletin), effective June 1, 1975 (38A), which required all DC-8 and DC-10 reserve pilots to be "within three (3) hours driving time of their equipment domicile during their days of reserve duty." The preliminary injunction was based on the Court's findings that the pilot bulletin constituted unilateral inplementation by ONA of conditions of employment which ONA was seeking to obtain in negotiations toward a new collective bargaining agreement under the Act. The bulletin

was issued May 14, 1975, only one day after the National Mediation Board (herein the NMB) docketed the ALPA-ONA negotiations pursuant to Section 5 of the Act, 45 U.S.C. §155.* Among the negotiating items which were presented to the NMB for mediation were ONA's proposals on DC-8 and DC-10 reserve pilot notification. The preliminary injunction has been stayed pending argument of the appeal. (381A, 386A).

Reserve Procedures at ONA

All ONA pilots are assigned for operational purposes to a specified air terminal, known as an equipment domicile, but it is undisputed that ONA pilots live throughout the United States regardless of the location of their equipment domicile, and that they have every right to do so. (43A). The company's DC-8 pilots are all assiged to Kennedy International Airport and the DC-10 pilots are assigned to Kennedy and Los Angeles Airports. Of the 79 DC-8 and DC-10 pilots assigned to Kennedy, 49 live more than 150 miles from New York City; of the 12 DC-10 pilots assigned to Los Angeles, 7 live more than 150 miles from that city. (23A).

Each month the ONA pilots bid on a seniority basis for a scheduled line or reserve line of flying. The scheduled line tells the pilot the specific trips he will fly, and the reserve line shows the days of rest for the reserve holder;

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*Relevant statutory provisions are reproduced below in a statutory appendix.

on days other than the days of rest the reserve pilot is required to advise the crew scheduler where he may be reached for notice of a trip assignment. (377A-378A). Such days are sometimes referred to as "reserve notification days." Under the pilot contract the reserve notification days are not considered days in which a reserve pilot is on duty; he is not paid per diem or credited with duty time for those days unless on a day when he actually serves as pilot on a trip. (383A-384A; 169A-170A).

Historically, ONA's DC-8 and DC-10 reserve holders spend their reserve notification days at any location of their choice. (172A, 230A). The only ONA reserve holders who were required to station themselves within a certain distance from their equipment domicile were certain Electra pilots who operated under separate scheduling rules negotiated between the company and pilots. (155A, 363A, 370A). There has been no general practice of designating the location for waiting for notice of trips as a reserve pilot. In practice, this meant that the reserve holders would wait for trip notice at home, even if their homes were several hundred miles from the equipment domicile. The pilots them commute to their flights by commercial air carrier. (171A-172A).

This system - enabling reserve pilots to remain at home while waiting for trip notice - was facilitated by the

24-hour rule in Section 31.L. of the pilot contract, which states in pertinent part:

> "A pilot shall have a minimum of twenty-four (24) hours notification prior to reporting time for any duty..." (340A).

The concept of "duty" is defined at Sections 5.G.1.C. and 5.G.2.C. which provide:

> "On duty time will begin two (2) hours prior to scheduled departure or at sign in and end thirty (30) minutes after clock in or at sign out." (274A).

Until 1968 all ONA pilots were on reserve status, without assigned schedules. (146A). Moreover, until the late 1950's, the pilots had no 24-hour rule in their contract so that all pilots were on "standby reserve". (137A-138A). In 1959, the language of Section 31.L. was placed in the contract to end the old standby system and enable the reserve pilots to have advance notice of trips. (139A). The same language has been in all successive ALPA-ONA contracts. When the contract was again modified in 1968 to add the concept of schedule holders, there was no change in the 24-hour rule, which continued to apply to the reserve and schedule holders alike. (146A).

It is undisputed that the 24-hour rule applies without distinction to schedule holders and reserve holders.

Although ONA contended that pilots have often flown on less than 24 hours notice, the District Court accepted ALPA's evidence that these flights were performed "because the pilots preferred to cooperate with the airline," (378A-379A), and the Court found that flights performed on less than 24 hours notice "do not constitute an established practice." (379A).

ONA's Efforts to Change Established Conditions

Under Section 5.H.11. of the Agreement (279A), scheduling matters are required to be the subject of negotiations and agreement between the parties rather than unilateral action by either side. This section provides:

> "The Local Executive Council shall appoint a Local Scheduling Committee for each pilot domicile and for each type of equipment flown from that domicile to establish with the Company Local Scheduling Rules and to assist the Company in administering this Section. Pilot assignment, eligibility and competition for open flying shall be governed by the Local Scheduling rules."

In August 1973, shortly after the effective date of the current pilot contract, ONA and ALPA representatives met to negotiate new local scheduling rules. ONA requested a new provision which would permit the company to assign reserve pilots to specific locations on their reserve notification days, and which would reduce the notice period to less

than 24 hours. (152A, 153A, 156A, 157A). The pilot representatives declined to agree to such a proposal at that time, (157A-158A), and since that time the parties have failed to reach agreement on new local scheduling rules.

Negotiations toward a new collective bargaining agreement between ALPA and ONA began in January, 1975 after ALPA served the usual "notice of intended change" in accordance with Section 6 of the Act. In one of the early negotiating sessions in January, 1975, ONA representatives told ALPA that the company wanted to delete Section 31.L. from the agreement - without any indication that company's object was merely to clarify existing rights. (123A). The ALPA representatives stated that Section 31.L. should remain unchanged. (124A). Later, in April, 1975, after meetings and discussions on several other negotiating topics, ONA again proposed a change in Section 31.L. - this time requesting that the minimum notification period prior to trips for pilots holding reserve lines be reduced to less than 24 hours, the precise reduction being unspecified. ONA stated in the meeting that the purpose of their proposal was to require pilots holding reserve lines to station themselves within short range of the equipment domicile on reserve notification days. ALPA refused to agree to any change in Section 31.L. (124A-125A). On April 18, 1975 the pilot and ONA negotiators agreed that further progress toward a new collective bargaining

agreement was not possible without invoking the services of the NMB pursuant to Section 5 of the Act, 45 U.S.C. §155. The impasse in bargaining resulted from disagreement over several items, including economic items as well as the ONA proposal regarding Section 31.L. The two sides drafted a summary showing agreements reached and open and unresolved issues for submission to the NMB. Section 31.L. was identified as an open issue, with ONA holding fast to its proposed amendment described above.(123A-127A, 356A). A joint application for the mediation services of the NMB was filed shortly thereafter, and on May 13, the NMB docketed the impasse. The purpose of the NMB's services, of course, was to assist the parties in reaching a new agreement through the negotiations. As of this writing no agreement has been concluded.

ONA Takes Unilateral Action

On May 14, 1975 - the day after the NMB docketed the contract negotiations - ONA took matters into its own hands. After trying without success for almost two years to get ALPA to agree to changing the agreement to provide for a reduced notification period for pilots on reserve, ONA issued pilot bulletin 35-75. Pilot Bulletin 35-75 states

The reserve pilots were being told, for the first time, that no matter where they live they had to be at or near Kennedy or Los Angeles Airports on the reserve notice days, and be prepared for a trip on short notice, even if they were never called to take such a trip. This meant immediate disruption to the pilots' lives and to the established long-standing practice enabling the reserve holder to stay home until called for a trip. (30A-33A).

The immediate impact of bulletin 35-75 on the pilots was summarized as follows by the ONA pilot chairman, Captain Marshall:

> "That it would tend to work a extreme hardship on some of the pilots and would cause certain inconvenience and in some cases a monetary loss and those are the pilots - the pilots that I am referring to are pilots living great distances away from New York. It would require apartments with temporary quarters of some sort to satisfy pilot bulletin 35-75." (110A).

> it may be maintained until the parties have an opportunity to follow the procedures of negotiation, mediation and arbitration under the Railway Labor Act." (379A).

The Court found that under the established working conditions reserve pilots

> "customarily know only their scheduled days of rest. On other days they are required to leave with ONA crew schedulers a contact number where they can be reached for notification of flights." (378A).

Thus, as found by the Court, under established conditions the reserve pilots were not directed to remain at specific locations for notice. The Court also found that the established conditions did not include acceptance by the pilots of trips with less than 24 hours notice, although many pilots have often accepted such trips in order to cooperate with ONA as a voluntary matter for operation purposes. (379A; 112A).

The District Court found that the history of ONA's efforts to negotiate local scheduling rules and changes in the pilot collective bargaining agreement regarding reserve notification procedures demonstrated that "ONA regarded the matter as open and ambiguous and in need of negotiation." (382A). Thus the Court rejected as lacking credibility ONA's contentions that its negotiations with ALPA only reflected an attempt at avoiding future controversy over existing reserve notification rights held by ONA. The Court also

found that ONA was required to negotiate its scheduling procedures with ALPA for the very reason that it had clearly agreed to do so. Thus, the Court stated:

> "When ONA faced a scheduling difficulty with regard to its Electra pilots, it appears that it negotiated with the Local Scheduling Committee for those pilots special rules which provided that less than 24 hours notice would be required. If Section 31.L. (which applies to all pilots) means what ONA says it means, this negotiation appears to have been unnecessary. ONA could have "unilaterally" put the special rules into effect - as it has done here. Furthermore, the Collective Bargaining Agreement clearly provides that Local Scheduling Rules should be negotiated. Thus, a matter such as the 24 hour rule appears to be a proper subject for negotiation." (383A).

The facts before the District Court, therefore, evidenced that the status quo with respect to ONA pilot working conditions included the existing 24 hour notification requirement and right of pilots holding reserve lines to serve reserve notification days at locations of their choice, that ONA unsuccessfully sought to change those working conditions through negotiations with the pilot group, and that ONA then implemented the changes it desire unilaterally without awaiting conclusion of the mediation process. In this context the District Court properly found, citing relevant authority, that "ONA may not implement its pilot bulletin as planned, for to do so would be to take unilateral 'self-help' without going through the necessary procedures

of the Railway Labor Act." (384A). The District Court buttressed its analysis of the status quo by reference to the inconsistencies in ONA's argument that the contract arguably permitted it to take unilateral action reflected in the pilot bulletin,* but the Court based its decision on the wrongfulness of ONA's effort to change the status quo in the midst of mediation and not on any judicial interpretation of the pilot contract.

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*ONA contended in the District Court-advancing its own interpretation of the pilot contract--that the 24 hour rule only requires 24 hours notice prior to reporting for duty, that a pilot waiting for notice of a trip is already on duty, therefore that the contract is not violated by requiring the pilot to stand by for only three hours notice of a trip. The Court found this position illogical in terms of the overall contract, noting that if the pilots are "'on duty' and away from their domicile then the contract provides that they must be paid per diem expenses. It was testified to at the hearing that pilots on reserve duty are not paid per diem expenses. In addition," the Court continued, "it appears that the days when pilots on reserve duty are not called for a trip are counted by the company as 'days of rest'. This belies ONA's notion that these pilots are 'on duty.'" (383A-384A). The Court did not rely on these findings as the basis of its decision, but only noted that they buttressed its conclusion that ONA was attempting to change the status quo through the pilot bulletin.

ARGUMENT

POINT I

THE PRELIMINARY INJUNCTION ORDER ENTERED BY THE DISTRICT COURT AGAINST ONA SHOULD NOT BE REVERSED WITHOUT A CLEAR SHOWING OF ABUSE OF DISCRETION AND CLEARLY ERRONEOUS FINDINGS

Entry of Injunctive Relief by the District Court Was Within its Sound Discretion and Should Not Be Reversed or Modified Without a Clear Showing of Abuse of Discretion.

It is settled law that the granting of an interlocutory injunction, such as that entered by the District Court, is a matter resting in the sound discretion of the lower Courts and should not be reversed or modified without a clear showing of an abuse of discretion. This doctrine is, moreover, clearly applicable to Railway Labor Act disputes.

In Flight Engineers' Int'l Ass'n. v. American Airlines, Inc., 303 F.2d 5 (5th Cir. 1962), the District Court issued a preliminary injunction to prohibit a strike pending determination of the bargainability of issues which the carrier claimed were not open for negotiation. On appeal, this Court refrained from disturbing the injunction, stating:

> "In this mixture of the old and the new, the legal controversy centers around the availability of another ancient mechanism - the equity injunction - to enforce compliance with the statute enacted initially to cover railroad employees, on the one hand, and on the other, the prohibitory effect of a statute enacted to keep federal courts out of labor relations via the injunctive power." 303 F.2d at 6-7.

* * *

"Thus, the proof showed the existence of a very real, serious, and perhaps difficult controversy." 303 F.2d at 10.

* * *

"What is a Court to do under such circumstances? ...That is the classic office of a preliminary injunction. So much so is it that on review of such an interloctury order, we do not examine into the merits as such. The probable merits are looked to only insofar as they bear on the question whether the trial Court abused its discretion in granting interim relief." 303 F.2d at 11.

* * *

"If no injunction was issued, the Union would be free to strike. This would prejudge the issue at stake, or, more likely, finally render it all moot. In the meantime, the Carrier's interest would be affected. But more so, the public interest reflected by congressional purpose to provide orderly conciliation and adjustment machinery would be severely jeopardized." 303 F.2d at 12.

See also:

Nalco Chemical Co. v. Hall, 347 F.2d 90 (5th Cir. 1965), and cases cited therein at page 92.

This "abuse of discretion" standard has likewise been recognized by other Courts of Appeals in reviewing preliminary injunctions. In Chicago and Illinois Midland Ry. Co. v. Bh'd of Railroad Trainmen, 315 F.2d 771 (7th Cir. 1963), judgment vacated and remanded for dismissal because of mootness, 375 U.S. 18 (1963), a Railway Labor Act case,

the Seventh Circuit, affirming preliminary injunctive relief against union self-help, said:

> "We do not, of course, express or intimate any opinion on the merits. Apart from the question of jurisdiction, the only issue open to our consideration in this appeal is whether the District Court abused its discretion in granting the preliminary injunction. As Chief Judge Major so aptly observed in Mytinger & Casselberry, supra (215 F.2d 384) 'this court is not authorized to reverse or modify such a decree unless such abuse is clearly shown.'" (Emphasis supplied). 315 F.2d at 776.

See also:

> Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, Int'l, 416 F.2d 633 (4th Cir. 1969), cert. denied, 90 S.Ct. 931 (1970); Mieselman v. Paramount Film Distributing Corp., 180 F.2d 94 (4th Cir. 1950).

The District Court's Findings of Fact Cannot Be Set Aside Without a Showing That They Are "Clearly Erroneous."

The scope of this Court's review of the findings of fact made by the District Court is established by Fed. R. Civ. P. 52, which provides that: "Findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The District Court had ample opportunity to observe the witnesses for ALPA and ONA during the hearing and to judge their credibility. Credibility findings were particularly

important in determining the facts regarding the existing working conditions on ONA. For example, there was a direct conflict in testimony between ALPA and ONA witnesses on the question whether as a matter of practice ONA traditionally designated the location where pilots holding reserve lines would pass reserve notification days. ONA contended below, as it does before this Court, that it "has always had, and has continuously exercised, the right ...to designate the location where pilots are to perform their reserve duty..." (ONA brief, p.2). This contention is obviously a matter of vital importance to ONA, inasmuch as the pilot bulletin is a change in working conditions if ONA did not designate the location for reserve availability prior to the bulletin.

To support its contention on designating location, ONA introduced two affidavits of its Assistant Vice-President, Lester R. Ferriss, Jr., who stated in his first affidavit (47A) that "[f]or all the time I have been with ONA, and for years prior to that time, it has been the consistent policy of ONA to designate the place at which pilots holding reserve lines...would perform their days of reserve duty." (47A). Ferriss went on to explain that "[p]ilots appear when and where designated on their bid-lines." (49A, par.7). However, Ferriss, when shown an ONA bid-line of the precise type referred to in his affidavit, for May, 1975 (359A, lines 21-24),

was required to admit that the bid-line does not show where the reserve pilots are to spend their days of reserve availability. (186A). And Ferriss' testimony was also directly contradicted by that of Captain Bruce Dries, a reserve holder, who testified:

> "Q Now, on your days [of] reserve availability, where do you generally spend your time?
>
> A At my home. I live in Pennsylvania.
>
> Q And has any company representative ever told you that that is where you are supposed to spend your time as a DC-8 reserve Captain?
>
> A No, I have never been told where to spend my time." (231A).

Resolving this conflict, the District Court found,

> "Pilots who have 'reserve' lines customarily know only their scheduled days of rest. On other days they are required to leave with ONA crew schedulers a contact number where they can be reached for notification of flights." (378A).

The pilot bulletin clearly changes established working conditions by imposing a new requirement on the reserve pilots that they be at a specified location chosen by the company on reserve availability days. That such a change results from the pilot bulletin is a matter of finding facts and not of interpreting the contract. The Court's findings are clearly supported by the testimony and involve credibility resolution between conflicting witnesses. Injunctive relief based on such findings was both appropriate and necessary under the Act.

POINT II

THE DISTRICT COURT PROPERLY FOUND ONA IN VIOLATION OF THE "MAJOR DISPUTE" PROVISIONS OF THE RAILWAY LABOR ACT AND ISSUED INJUNCTIVE RELIEF NECESSARY TO ENFORCE THE ACT AND PROTECT THE ONA PILOTS

Based on the hearing record and findings of fact, the District Court concluded that ONA's pilot bulletin 35-75 presented a "major dispute" governed by the provisions of Section 2, Seventh, 5 and 6 of the Act. The Court further concluded that ONA was attempting to make a unilateral change in existing conditions of employment in violation of the Act.

The District Court's determination that this case presents a "major dispute" is fully supported by decisions of the Supreme Court and Court of Appeals. The record shows that ONA sought to implement through the pilot bulletin exactly the type of reserve procedures that it was seeking from ALPA in the negotiations. Moreover, ONA's proposal for changes in reserve notification procedures was an open item in the docket before the NMB at the time the bulletin was issued. ONA's proposals to change the reserve procedures in the negotiations froze established working conditions with respect to the reserve procedures until the parties concluded a new agreement. Section 2, Seventh of the Act provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act."

Section 6 of the Act Provides in part:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proferred its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for a proffer of the services of the Mediation Board."

Thus, ONA's unilateral bulletin presented a classic instance of unlawful self-help giving rise to a "major dispute".

Nature of the Major Dispute Procedures
Contrasted With Minor Dispute Procedures

Under the Act, all disputes between carriers and the collective bargaining representatives of their employees are either "major disputes" or "minor disputes". If a matter is a "major dispute" the parties are required by the Act to exhaust extended procedures of negotiation, mediation and "cooling off periods", before the employer may implement changes in working conditions or in a collective bargaining agreement, and before the union may strike. In such instances, as stated by this Court,

> "the Mediation Board is to use its best efforts to bring the parties to an agreement or, if these fail, to

> induce them to submit to arbitration. If this also fails, no change shall be made in rates of pay, rules, or working conditions or established practices for 30 days and, if within that period an emergency board is created, for 30 days after its report. 45 U.S.C. §§155, 156, 160. After all this is over, the parties may resort to self-help."

Seaboard World Airlines, Inc. v. Transport Workers Union, 425 F.2d 1086, 1089 (2d Cir. 1970). If a dispute is a minor dispute, the Act

> "broadly speaking, prescribes a [compulsory] arbitral process with boards of adjustment [System Board] composed of equal numbers of management and labor and with the Mediation Board to name a referee in the event of deadlock. Awards of such boards are 'final and binding upon both parties to the dispute...'" Id.

The workings of the major dispute procedures were illustrated in Brotherhood of Railway & Steamship Clerks v. Florida E.C.Ry. Co., 384 U.S. 238 (1966). There the union proposed in negotiations a wage increase and a requirement of six months' advance notice of impending layoffs and abolition of job positions. The carrier did not agree to this proposal. As the Court stated,

> "The dispute underwent negotiations and mediation as required by the Railway Labor Act. When those procedures proved unsuccessful, a Presidential Emergency Board was created under §10 of the Act, which after hearings recommended a general pay increase of about 10 cents per hour and a requirement of at least five days' notice

> before job abolition. In June 1962, this settlement was accepted by all the carriers except FEC. Thereupon, further mediation was invoked under the Act but again no settlement was reached. The Act makes no provision for compulsory arbitration. Section 5 First does, however, provide for voluntary arbitration at the suggestion of the National Mediation Board. The suggestion was made but both the unions and FEC refused. Further negotiations were unsuccessful and on January 23, 1963, the nonoperating unions struck. When that happened, most operating employees refused to cross the picket lines." (384 U.S. at 240-241; footnotes omitted).

The Court added:

> "The demand for a 25-cent-per-hour wage increase and for six months' advance notice of impending layoffs and job abolitions was a major dispute covered by §2 Seventh (Elgin, J. & E. R.Co. v. Burley, 325 U.S. 711, 723...) and it had proceeded through all the major dispute procedures required by the Act without settlement. The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. * * * At that juncture self-help was also available to the carrier. * * * [B]oth parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute * * *." 384 U.S. at 243-244.

Where a carrier or union have initiated action which creates a major dispute, the Courts are empowered to issue injunctive relief to restrain the improper action until

the parties have concluded an appropriate collective bargaining agreement or have exhausted the statutory major dispute procedures. In the latter instance, as the Supreme Court stated, the parties are free to take self-help only after the NMB has released the parties and the 30-day cooling-off period has been completed. As the Court held in Detroit & Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142, 147 (1969), the Act

> "imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted."

The Court added,

> "The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes ususally arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." 396 U.S. at 150.

With respect to the importance of injunctive relief to restrain carrier self-help before the Act's procedures are exhausted, the Court stated,

> "If the railroad is free at this stage to...resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively." 396 U.S. at 155 (footnote omitted).

ONA's Proposal to Revise the Pilot Agreement by Changing Reserve Notification Procedures Was the Subject of Bargaining and Mediation and Could Not Be Implemented Unilaterally

The extensive evidence and testimony in the District Court hearing left no doubt that ONA and ALPA were in negotiations and mediation over the subject matter of Pilot Bulletin 35-75 at the time the bulletin was issued. As previously discussed, the testimony of ALPA negotiators showed:

a) ONA proposed as part of its opening proposals in the negotiations, in January, 1975, that Section 31.L., the "24-hour rule," be completely eliminated. The pilots rejected the proposal.

b) ONA proposed in April 1975 that Section 31.L. be revised by reducing the stated notification period for reserve pilots. ALPA again refused, insisting that Section 31.L. be kept as is.

c) The parties then drew up an argenda for the NMB showing that Section 31.L. is an "open item." (37A;381A).

d) ONA issued its Pilot Bulletin the day after the NMB docketed the contract dispute.

Taking a position which can be expected in this type of case, ONA argued in the District Court that its negotiations with ALPA over reserve notification procedures can only be regarded as an effort to clarify its existing rights. However, the company did not put in any evidence that it advised ALPA of this position in January 1975 - when ONA proposed that Section 31.L. be dropped from the contract. Moreover, the chairman of the ALPA negotiating committee, Captain Secola, credibly testified that the ONA spokesman did not state in the April negotiations that the company proposed a change in Section 31.L. only to clarify existing rights. (134A). The District Court, observing the witnesses, concluded that ONA's negotiations over Section 31.L. with ALPA showed that "a matter such as the 24 hour rule appears to be a proper subject for negotiation." (383A).

The history of the negotiations over local scheduling rules starting in 1973 provided further significant evidence that the reserve notification procedures were a required subject of negotiations rather than unilateral action. As previously discussed, the contract itself requires that local scheduling rules be established by negotiations. As for the scope

of such rules, ONA has never disputed in this proceeding that reserve notification procedures are part of the subject matter for local scheduling rules. The credited evidence showed that the pilots and company did have scheduling rules for the Electra equipment which contained procedures for short-notice reserve pilots similar to the procedures in Pilot Bulletin 35-75. These procedures came into existence only because the pilots agreed to them in local scheduling negotiations. (383A; 155A). In 1973, 1974 and 1975, ONA tried to get ALPA to agree to similar procedures for the DC-8 and DC-10 reserve holders. This effort was not successful, and it is undisputed that local scheduling rules for DC-8 and DC-10 pilots never came into effect under the current agreement. ALPA never gave ONA the authority to have short-notice reserve pilots in DC-8 and DC-10 equipment.

From this history of negotiations over scheduling rules, the District Court buttressed its finding that the 24 hour rule is "a proper subject for negotiation" rather than unilateral action by ONA.

ONA's Effort to Change the Contract Through Negotiations Places This Dispute Directly Within the "Major Dispute" Category.

The history of ONA's efforts to negotiate new provisions in the pilot contract makes this a classic case for

application of the established principle that the parties in negotiations and mediation under the Act are not free to implement contract proposals or take other self-help unilaterally during the progress of the Act's mediation procedures. ALPA and ONA throughout months of negotiations and in submitting their dispute to the NMB have treated the dispute as a major dispute and admitted that the subject matter is appropriate for negotiations and mediation rather than unilateral action. The parties stipulated in submitting the case to the NMB that reserve notice procedures are an "open" item for further negotiation and mediation.

If ONA can first invite protracted negotiations and mediation over its proposal to change Section 31.L., but unilaterally implement such proposal only the day after the contract dispute has been docketed by the NMB, there is no incentive to negotiate. The structure of collective bargaining is clearly threatened by such action.

These principles are well illustrated in many Court decisions. The Seventh Circuit, for example, in United Transportation Union, Lodge 621 v. Illinois Terminal R.R. Co., 471 F.2d 375 (1972) affirmed the District Court's issuance of injunctive relief against a unilateral bulletin by the carrier which came during negotiations on the subject matter of the bulletin. The Court stated:

> "The district court found that '[t]here were conferences or negotiations

> concerning the [Section 6] notice on several occasions between the General Chairman of the Union and the Manager of Labor Relations and Personnel.' Negotiations under Section 6 had commenced on the very subject to which the unilateral bulletin later pertained. Unlike Rutland, Hilbert and Norfolk, the kind of dispute here involved was characterized and treated by both parties as a major dispute before the specific bulletin was posted. The district court so found and held. In order for us to consider his findings and conclusions clearly erroneous, it would be necessary for us to conclude that the dispute was a minor one as a matter of law." 471 F.2d at 379.

See also United Transportation Union v. Ba.. r, 499 F.2d 727, 731 (7th Cir. 1974), where the Court stated that the Illinois Terminal Railroad decision depended partly on the fact that:

> "There the union served a Section 6 notice on the railroad six months prior to the railroad's unilateral attempt to effect new assignments, during which time the parties characterized and treated the dispute as a major dispute."

Those decisions reflect the basic workings of the Railway Labor Act. A carrier is not free to implement its contract proposals until exhaustion of the Act's major dispute procedures. ONA's Pilot Bulletin 35-75 is precisely that type of premature action and was properly enjoined so that the Act's processes might proceed peacefully.

Similarly, in Southern Ry. Co. v. Brotherhood of Locomotive Firemen, 337 F.2d 127 (D.C. Cir. 1964), the Court upheld injunctive relief against unilaterial carrier action on a proposed charge in the collective agreement which was before the NMB at the time. It is particularly noteworthy that the District Court issued an injunction even though it properly "declined to interpret the disputed provision of the existing agreement and to decide what the rights of the parties were under that provision." 337 F.2d at 133. Instead, the District Court, affirmed by the Court of Appeals, issued an injunction only on the basis that the carrier was implementing its contract proposals unilaterally. The Court stated:

> "It is clear that, if the Mediation Board had concluded the mediation proceedings and if the other statutory procedures (acceptance or rejection of arbitration and possible presidential intervention, see Section 5 First and 10 of the Act, 45 U.S.C. §§155 First and 160), had been exhausted, Southern if it desired to do so could initiate the contract changes it proposed and the Union could strike. Brotherhood of Locomotive Engineers v. B. & O.R. Co., 372 U.S. 284, 83 S.Ct. 691, 9 L.Ed.2d 759 (1963). But with mediation still pending and not finally concluded, it is equally clear that Southern could not initiate changes in working conditions, absent agreement, without violating Section 6 of the Act which specifically provides that working conditions shall not be altered by the carrier until the controversy has been finally acted upon by the Mediation Board. See footnote 4, supra. The matter involved in this claim, a Section 6 proposal to revise or change the agreement, is of course a 'major' dispute." 337 F.2d at 131-132 (footnotes omitted).

ONA committed itself to the bargaining and mediation process, first, by providing in the pilot contract that scheduling rules must be a matter of agreement and secondly, by proposing new reserve notification procedures for the scheduling rules and in contract negotiations. These matters were before the NMB for resolution when ONA took unilateral action rather than waiting for the Act's processes to conclude. The District Court properly found that ONA went too far and that the pilot bulletin should be preliminarily enjoined.

Even if ONA Did Not Negotiate Over Reserve Notification, Requiring Reserve Pilot to Be at a Specified Location on Reserve Notification Days Was a Clear Change in Working Conditions

Pilot Bulletin 35-75 requires the DC-8 and DC-10 reserve holders to be at a specific location on their reserve days even though those pilots live all over the United States. This is a change in established working conditions requiring conclusion of negotiations and mediation under the Act.

Contrary to ONA's arguments that enjoining the Pilot Bulletin requires interpretation of the pilot contract, ONA's claimed right to require pilots to be at a specific location for reserve notice is a matter not covered by the current agreement or any local scheduling rules. Indeed,

the only contract provision that ONA relies on in this regard is the general "management rights" clause, Section 31.I. (339A) (See ONA brief, p.2). And ONA admits that no local scheduling rules are in effect for ONA's pilots. (82A, 87A). Nothing in the contract speaks to ONA's claimed right to decide where pilots will be on reserve notification days.

In this context, the issue is whether the Pilot Bulletin changes established working conditions in violation of Sections 2, 5 and 6 of the Act. The question becomes whether ONA had an established practice of requiring reserve pilots to wait for notice at any particular location, as claimed by ONA. If not, then the Pilot Bulletin changes working conditions unilaterally and unlawfully, even if ONA never entered into negotiations on the subject as shown earlier.

These principles were clearly established in Detroit & Toledo Shore Line R. Co. v. UTU, supra, 396 U.S. 142. There the Court rejected a carrier agreement that the status quo requirements of the Act only apply to working conditions covered in the parties' existing agreement, and the Court affirmed injunctive relief against a change in working conditions prior to exhaustion of the Act's major dispute processes. The Court stated:

> "The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions

> and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.
>
> "It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line has little merit. The railroad contends that a party is bound to preserve the status quo in only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of §§5, 6 or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of §6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement." 396 U.S. at 153-154 (footnotes omitted).

The determination of existing working conditions is a matter of fact-finding, not contract interpretation, and the District Court found that established working conditions did not include a requirement that reserve pilots remain at a location of the company's choice on reserve notification days. As previously discussed, this finding is based on

crediting ALPA testimony that DC-8 and DC-10 reserve pilots were always free to spend their reserve notification days at home or anywhere else they chose, and they were never told where to spend those days. The only contrary practice existed for Electra pilots, who had a different procedure under the local scheduling rules established by negotiations.

ONA did not establish to the satisfaction of the Court that the existing working conditions included a practice of designating the place where reserve pilots would wait for notice. To the contrary, it is clear that no such practices existed, and ONA's unilateral establishment of such a requirement clearly violated the Act. See, in addition to Detroit & Toledo Shore Line R.R. Co., supra, Baker v. United Transportation Union, 455 F.2d 149, 155-156 (3rd Cir. 1971). Cf. United Transportation Union, Local 31 v. St. Paul Union Depot Co., 434 F.2d 220, 222-223 (8th Cir. 1970), cert. denied, 401 U.S. 975 (1971).

By Reducing the Notification Period for Reserve Pilots ONA Changed Working Conditions in Yet Another Respect

The Pilot Bulletin unilaterally reduced the 24 hour notification period in Section 31.L. of the contract, for DC-8 and DC-10 reserve pilots. To justify this reduction, the company introduced evidence that many ONA pilots have

accepted trips on less than 24 hours notice. ALPA never denied this and asserted that both reserve and scheduled pilots have accepted trips on an emergency basis to prevent flights from being cancelled. Indeed, the evidence showed that this even happens on scheduled days of rest. However, ONA does not contend that the 24 hour rule no longer applies to schedule holders or that the pilots have given up their right to scheduled days of rest.

The fact is that responsible union officials have consistently made clear that the pilots are not waiving their rights by accepting trips on less than 24 hours to assist the company. As previously described, the Chairman of the ALPA DC-8 Local Council on ONA, who has been a reserve holder throughout most of 1975, does not accept trips on less than twenty-four hours notice given him on reserve notification days. He has refused such trips in order to avoid any waiver of the twenty-four hours rule, and ONA has not invoked any discipline because of his actions. (229A). The pilots can vary the agreement only through their authorized representatives. Individual agreements are not permitted. Where the appropriate representative has so clearly held fast to the terms of the agreement, there is no serious basis for inferring a waiver by the ONA pilot group. The Eighth Circuit has succinctly stated the test to determine whether asserted practices have formed part of a collective bargaining agreement, in United

Transportation Union, Local 31 v. St. Paul Union Dept. Co., supra, 434 F.2d at 222-223:

> "We think that an 'established practice' under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement...An 'established practice' under the Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either expressed or implied. Thus, prior behavior by itself, although similar to the acts in dispute, falls short of an 'established practice.' Whether prior conduct established a working practice under the Act depends upon consideration of the facts and circumstances of a particular case. Among the facts one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute."

It is indisputable that pilot representatives - the Chairman of the DC-8 Local Council in particular - have not indicated by their conduct that they are waiving the plain words of the agreement. Indeed, ONA's effort to find a waiver in the fact that many pilots accept trips without twenty-four hours notification only penalizes the pilots for aiding ONA operations.

Accordingly, ONA's action in unilaterally reducing the notification period for all DC-8 and DC-10 reserve pilots is a clear change in working conditions which was properly enjoined by the District Court.

POINT III

ISSUANCE OF INJUNCTIVE RELIEF WAS MANDATED BY THE STATUS QUO PROVISIONS OF THE ACT

It is established that injunctive relief to preserve the status quo is appropriate in the major dispute context even if the party seeking relief does not show irreparable harm in the equity sense. That is clear from the Supreme Court's rulings in Detroit & Toledo Shore Line R.R.Co., supra, quoted earlier. The same point has been made in other Courts. Thus, in Southern Ry. Co. v. Brotherhood of Locomotive Firemen, 337 F.2d 127, 133-134 (D.C. Cir. 1964), the Court stated:

> "[A] showing of irreparable injury is not required before the instant status quo injunction may issue, particularly because the question before us in concerned with far more than the private rights and duties of the parties. In the first place, Section 6 of the Act imposing the duty to maintain the status quo contains no qualifications to the effect that the carrier has no obligation to do so unless irreparable injury would otherwise result. Moreover, the public interest in peaceful settlement of labor disputes through utilization of statutory procedures is also involved, and irreparable injury to the complaining party is not an element which bears significantly or relevantly on furthering the public interest. Cf. Virginian Railway Co. v. System Federation No. 40, supra, 300 U.S. at 552, 57 S. Ct. at 601.

recognized the right of ALPA pilots to live anywhere in the world irrespective of their ONA domiciles.

* * *

Reserve pilots affected by ONA's notice will be forced to disrupt their homes, including family and business arrangement, in order to maintain alternative residences within the ONA domicile area.

b. DC-10 and DC-8 Reserve Pilots who do not currently reside in their domicile areas will be required to rent hotel rooms or apartments in those areas with immediate disastrous cash flow impact. The expense of maintaining two homes will be prohibitive for most pilots. The net result will be to force ONA pilots to move their homes to the ONA domicile area, despite their admitted right to reside elsewhere. This is plainly the result that the company foresees and desires.

c. Reserve Pilots will be required to remain in the domicile area on duty days whether or not flight assignments become available. They will be subjected to frequent periods of enforced idleness away from their homes and families.

d. The right of all ONA pilots to 24 hours' notification prior to flight duty will be immediately destroyed for DC-8 and DC-10 Reserve Pilots. The company may be expected to seek the same result for other pilots if its present effort succeeds.

e. The company's unilateral notices immediately and irreparably injure the right of every ONA pilot, as represented by ALPA, to the maintenance of established agreements and working conditions, without unilateral alteration by the company prior to exhaustion of the mandatory dispute resolution procedures embodied in the Railway Labor Act." (30A-31A).

See also testimony of Captain Marshall at 110A.

In contrast to the irreparable injury suffered by ALPA and the ONA pilots, ONA cannot demonstrate any irreparable injury to itself if the preliminary injunction is sustained. The record demonstrated that ONA pilots have cooperated with management to avoid any necessity for cancelling flights because of crew shortages. Captain Marshall's testimony was explicit:

> "Q As MEC chairman, would you know whether the company has been forced to cancel any flights because reserve pilots not being available?
>
> A I know of no such instances that they have been required to cancel a flight.
>
> Q With the 24-hour rule in effect, how is the company able to meet its needs for short-notice flights?
>
> A Simply by calling any pilot that lives in the area. In the case of JFK, I would say any pilot that lives in New York or Connecticut or New Jersey, whether the pilot is on reserve or on line, the company could call anyone.
>
> Q Do you know whether there is any practice by pilots to accept such flights if asked by the company?
>
> A. I would say that most pilots will accept the assignment.
>
> THE COURT: Will what?
>
> THE WITNESS: Will accept the assignment
>
> Q You were about to continue with your answer?
>
> A I said that most pilots would accept the assignment and the reason I had when I accepted such an assignment was that I wanted to assist the company in this emergency situation.

Q When you say "most pilots", are you referring to scheduled pilots as well as reserve pilots?

A. Both." (111A-112A).

In the decision the District Court urged "that the pilots continue to cooperate with the airline to the extent possible." (384A). There is no question that this will be done. It is also clear that many reserve holders have been and will continue to be irreparably injured by ONA's unilateral action. In a case of this type, the Courts do not look to equitable considerations, but those considerations demonstrate that the District Court's issuance of preliminary injunctive relief was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the preliminary injunction issued by the District Court should be affirmed forthwith.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

Railway Labor Act

Section 2, First provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Second provides:

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 2, Seventh provides:

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act.

Section 5, First provides:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

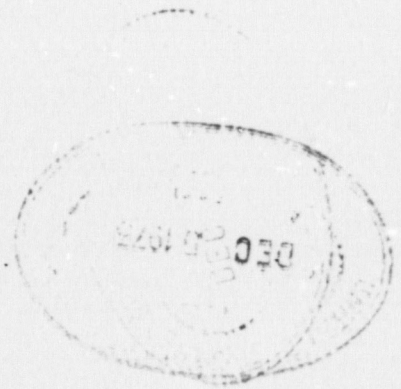
In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them

to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6 provides:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.



Service of three (3) copies of the

within Brief

is hereby received this 4th day of December 1973

by Breed Abbott & Morgan

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